IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO. 00-488-2
	:	
vs.	:	
	:	
ANGEL MARRERO	:	CIVIL NO. 04-5131

MEMORANDUM AND ORDER

Gene E.K. Pratter, J. August 18, 2006

Angel Marrero has filed a Motion to Vacate, set Aside or Correct his Sentence Pursuant to 28 U.S.C. § 2255. Because the Court finds that Mr. Marrero failed to exercise the necessary due diligence that would have met the one year statute of limitations for filing habeas petitions, his petition is untimely and, therefore, denied.

I. BACKGROUND

Mr. Marrero was charged in an indictment with 15 counts of drug trafficking. Mr. Marrero pled guilty to the charges. As a result of negotiations with Mr. Marrero's defense counsel, the Assistant U.S. Attorney filed an information pursuant to 21 U.S.C. § 851 containing notice of only one criminal conviction, in return for Mr. Marrero's waiver of trial and entry of a guilty plea. Mr. Marrero was sentenced to a term of 262 months on April 30, 2003. Mr. Marrero's initial pro se motion to vacate his sentence was dated October 29, 2004, followed by an amended motion after the appointment of counsel August 16, 2005.[1] In his amended motion, Mr. Marrero claimed, inter alia, that he had instructed his court-appointed trial counsel,

[1] Present CJA counsel filed the amended § 2255 motion on August 16, 2005. The parties agree that the amended motion relates back to Mr. Marrero's pro se filing.

Wentworth D. Vedder, to file a direct appeal of the conviction, and that counsel did not do so.[2] The Government responded to Mr. Marrero's motion by arguing, inter alia, that the motion was filed more than one year after his conviction became final, and, thus, is untimely. The Court held a hearing on the petition in which counsel for both parties examined Mr. Marrero and Mr. Vedder concerning the communications between the two following the guilty plea, as well as Mr. Marrero's efforts to identify the "status" of his supposed appeal prior to his filing of the habeas petition. Following the hearing, the Court invited supplemental briefing from the parties. The evidentiary hearing, as well as the subsequent submissions of the parties, have narrowed the question before the Court to whether Mr. Marrero complied with 28 U.S.C. § 2255(4) which requires that a habeas petition be filed within a one year period from the "date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence."

At the hearing, Mr. Marrero testified that following his guilty plea, he instructed Mr.

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[2] Mr. Marrerro also claims in his amended motion that (1) his guilty plea was based on a misrepresentation by the Government concerning the possibility of a mandatory life sentence, (2) his attorney was ineffective for failing to recognize this mistake, (3) his attorney was ineffective for failing to appeal because Mr. Marrero thought he would not be subject to career offender status for sentencing purposes based on his understanding of the plea agreement, and (4) 21 U.S.C. § 841 is unconstitutional. Concerning the alleged prosecutorial misrepresentation, Mr. Marrero asserts that the Assistant U.S. Attorney told the Court that she would file an information asserting only one prior felony drug conviction, (Mr. Marrero does not dispute that more prior felony drug convictions could have been included in the information), because if the notice contained more than one drug conviction, and Mr. Marrero went to trial, he would be subject to a mandatory life sentence if convicted on one or more counts of the indictment. Mr. Marrero asserts that he relied on this representation by the Government and his counsel's advice, and in order to avoid a mandatory life sentence he entered a plea of guilty. At the hearing on this matter, Mr. Marrero's counsel also explained that Mr. Marrero contends he should have received consideration under Rule 35 for testifying before a grand jury after his sentencing. Because the Court has concluded that this petition was untimely, the Court will not address these claims.

Vedder to file an appeal. Mr. Marrero also testified that he and Mr. Vedder discussed the possibility of a Rule 35 motion from the Government for a reduction of his sentence. Mr. Marrero testified that Mr. Vedder instructed him "if anything happen[s]" to "use me as ineffective assistance of counsel to come back down." Mr. Marrero further alleged that he wrote Mr. Vedder "[l]ike ten times" and asked about the appeal in each letter. Mr. Marrero claims he never received any response from Mr. Vedder, and Mr. Marrero claims he never received any indication that an appeal was ever filed on his behalf. Not until August of 2004 did Mr. Marrero find out about the "status" of his appeal when his brother contacted the court of appeals and discovered that no appeal had been filed.

Mr. Vedder testified that, while he discussed the possibility of a Rule 35 hearing with Mr. Marrero, they never discussed an appeal and that he never indicated to Mr. Marrero that an appeal had been filed. The Government offered as evidence three letters from Mr. Marrero to Mr. Vedder sent in July and August of 2004. Mr. Marrero testified that he sent more than three letters, and Mr. Vedder acknowledged that there could have been more, but he did not recall any. Mr. Vedder also denied ever advising Mr. Marrero to allege ineffective assistance of counsel in post-conviction proceedings.

The Court finds Mr. Marrero's testimony that following his guilty plea and sentencing he directed Mr. Vedder to file an appeal highly doubtful. Moreover, even if one were to read the letter indicating Mr. Marrero's "grave concern over the status of my pending appeal" as supportive of the contention that Mr. Marrero had so directed his counsel, there is no indication that Mr. Vedder, or anyone else for that matter, ever gave Mr. Marrero any reason to believe that an appeal had actually been filed on his behalf. Furthermore, Mr. Marrero has failed to persuade

the Court that he could not have determined at an earlier, timely point that his appeal was never filed. Thus, the Motion will be denied.

II. DISCUSSION

A. Timeliness

Mr. Marrerro argues that his motion was timely under 28 U.S.C. § 2255(4). Pursuant to that paragraph, the period of limitation begins to run on "the date on which the facts supporting the claim or claims presented *could* have been discovered through the exercise of due diligence." (emphasis added). Therefore, an inquiry under paragraph four must begin with a determination of when the facts supporting the putative claim could have been discovered. See Wims v. United States, 225 F.3d 186, 189-90 (2d Cir. 2000).

The test is an objective one. The Third Circuit Court of Appeals, citing Wims in a case involving a federal habeas petition by a state prisoner, has explained that "[d]ue diligence does not require 'the maximum feasible diligence, but it does require reasonable diligence in the circumstances.'" Schlueter v. Varner, 384 F.3d 69, 74 (3d Cir. 2004) (citing Moore v. Knight, 368 F.3d 936, 940 (7th Cir. 2004) (quoting Wims v. United States, 225 F.3d at 190 n.4)). District courts have denied habeas petitions in similar factual scenarios where due diligence would have resulted in a more prompt filing. See e.g., Cimini v. United States, No. 05-71392, 2005 U.S. Dist. LEXIS 12580 (E.D. Mich. June 27, 2005) (the court denied petition where Petitioner was capable of discovering that no appeal had been filed well over a year before motion to vacate was filed); United States v. Barrett, No. 04-0855, 2005 U.S. Dist. LEXIS 7758 (W.D. Wis. April 26, 2005) (the court held that defendant failed to demonstrate that he exercised due diligence in determining whether an appeal had been taken, and found that defendant's

averments about the difficulty of making telephone calls from administrative segregation did not account for a five month period of time when defendant was not in administrative segregation and could have taken more steps to learn the status of his appeal); Walls v. United States, No. 04-1135, 2005 U.S. Dist. LEXIS 35214 (E.D. Wis. Dec. 6, 2005) (the court found that the petition was untimely because the inmate did not exercise due diligence with respect to discovering whether an appeal had been filed when he waited more than two years, and had other conversations with his lawyer, but did not expressly ask about any appeal during that time period).

Furthermore, because appeals are matters of public record, unless the conditions of one's confinement are unusually onerous, determining whether an appeal has been filed in a matter is not particularly difficult. See Montenegro v. United States, 248 F.3d 585, 593 (7th Cir. 2001) (holding that § 2255 motion was untimely and noting that the fact that an appeal had not been filed was a matter of public record that reasonable diligence could have unearthed), partially overruled on other grounds, Ashley v. United States, 266 F.3d 671 (7th Cir. 2001); cf. Owens v. Boyd, 235 F.3d 356, 360 (7th Cir. 2001) (the court held that the lack of a petition for review by the state supreme court was a matter of public record, and therefore the prisoner could have discovered that no petition had been filed as soon as the period for filing such petitions had expired).

In Wims, which the Petitioner relied on for his primary authority on the issue of timeliness, the court remanded the case to the district court rather than granting the petition and held:

As an appellate court, we cannot say precisely when, in exercising due diligence,

> [Petitioner] would have discovered his counsel's failure to appeal. This is so because the date on which the limitations clock began to tick is a fact-specific issue the resolution of which depends, among other things, on the details of [Petitioner's] post-sentence conversation with his lawyer and on the conditions of his confinement . . . . Although these questions are appropriately answered by the district court, we can, however, say that the five-month delay . . . - one year before [Petitioner] sought habeas relief - is not so clearly unreasonable that it plainly appears from the face of appellant's petition and supporting papers that he is barred from habeas relief.

Wims , 225 F.3d at 190-191 (2d Cir. 2000).

In the present case, the Petitioner's claim also relies on the fact that his counsel did not file a notice of appeal. The question, therefore, is when Mr. Marrero could have discovered that a notice of appeal was not filed. Because the significant fact in this case is a matter of public record, the date on which it could have been discovered can be determined without difficulty. As the Petitioner himself admitted during the evidentiary hearing, his own brother finally inquired with the court of appeals as to the status of any appeal. Furthermore, as the defendant knew from the recitation of the panoply of rights given to him at his sentencing hearing, any notice of appeal had to be filed within ten days of judgment.[3] Mr. Marrero's sentencing occurred on April 30, 2003, and, therefore, he had reason to believe that a notice of appeal would have to be filed by May 14, 2003. For reasons that are not clear from the record, the judgment in this case was not actually entered until May 8, 2003; therefore, the ten day appeal period did not actually expire until May 22, 2003.

Although Mr. Marrero argues that the Court must take prison conditions into account in

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[3] Judge Clarence Newcomer specifically instructed Mr. Marrero at the Petitioner's sentencing: "I want to advise you, Mr. Marrero, that you have the right to appeal this sentence and you must appeal within 10 days from the entry of judgment in this case in the United States Court of Appeals for the Third Circuit." Sentencing Transcript, April 30, 2003, at 41:5-9.

assessing when a fact could have been discovered by due diligence, he presented no evidence of any prison conditions that would or could excuse his failure to inquire into the status of any appeal. While Mr. Marrero testified that he is not skilled at writing English, the Court notes that Mr. Marrero had no difficulty finding fellow inmates to write letters for him in English. He also had family members who assisted him.

Mr. Marrero filed his motion on October 29, 2004.[4] Therefore, the motion is unequivocally untimely if the fact on which Mr. Marrero relies, namely, the absence of a notice of appeal, could have been discovered any earlier than October 29, 2003. Mr. Marrero did not contact the Court of Appeals, through his brother, until August of 2004 (over 15 months after he was sentenced.) Even after he took that step, he waited another two months before filing his motion. In the exercise of due diligence, a reasonable prisoner who had been told appeals needed to be filed within 10 days of judgment and who believed he had instructed his lawyer to do so, could and would have found out that no appeal had been filed and then, in turn, filed his own petition well before the 17 months that had passed before Mr. Marrero filed his petition. The Court does not find Mr. Marrero's testimony credible to the extent that it would suggest a contrary conclusion. Therefore, his petition is denied as untimely in accordance with 28 U.S.C. § 2255(4).

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[4] The Defendant's supplemental memorandum of law concerning the timeliness issue uses November 3, 2004, as the date of filing. Based on a generous application of the "prison mailbox" rule, the Government uses October 29, 2004, which is the date of signature on the Defendant's motion. Federal courts utilize the mailbox rule, "accept[ing] the date that the prisoner delivers his legal filing to prison authorities for mailing as the date of filing." Harris v. Vaughn, 129 Fed. Appx. 684, 687 n.8 (3d Cir. 2005) (citing Houston v. Lack, 487 U.S. 266, 275 (1988)). The Court will likewise afford Mr. Marrero the benefit of the doubt by assuming that the motion was delivered to prison authorities on the earlier October 29, 2004 date on which it was signed.

III. Certificate of Appealability

Finally, the Court must determine whether a certificate of appealability should be issued with respect to Mr. Marrerro's § 2255 motion. When a federal court denies a habeas petition on procedural grounds without reaching the underlying constitutional claim, the prisoner must demonstrate that jurists of reason would find it debatable: (1) whether the petition states a valid claim of the denial of a constitutional right; and (2) whether the court was correct in its procedural ruling. Slack v. McDaniel, 529 U.S. 473, 484 (2000). "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." Id. For the reasons discussed above, the instant Petition is barred by the one-year period of limitation, and the Court is convinced that reasonable jurists would not conclude otherwise. Therefore, a certificate of appealability will not be issued.

IV. CONCLUSION

For the reasons discussed above, the Court denies Mr. Marrero's Motion and Amended Motion to Vacate, set Aside or Correct his Sentence Pursuant to 28 U.S.C. § 2255. An appropriate Order consistent with this Memorandum follows.

BY THE COURT:

/s/ Honorable Gene E.K. Pratter
GENE E. K. PRATTER
UNITED STATES DISTRICT JUDGE

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UNITED STATES OF AMERICA	:	CIVIL ACTION
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vs.	:	
	:	
ANGEL MARRERO	:	NO. 00-488-2

ORDER

Gene E.K. Pratter, J. August 18, 2006

AND NOW, this 18th day of August, 2006, upon consideration of Angel Marrero's Motion and Amended Motion to Vacate, set Aside or Correct his Sentence Pursuant to 28 U.S.C. § 2255 (Docket Nos. 62 and 75), and supplemental brief on the issue of timeliness, (Docket No. 80), the responses and replies thereto (Docket Nos. 77 and 81), **IT IS HEREBY ORDERED** that the Motion is DENIED and that there is no basis for the issuance of a certificate of appealability. The Clerk of the Court shall mark this case closed for statistical purposes.

BY THE COURT:

/s/ Honorable Gene E.K. Pratter
GENE E. K. PRATTER
UNITED STATES DISTRICT JUDGE